

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DANIEL J. WIK,

Plaintiff,

-vs-

DONALD R. KUNEGO,

Defendant.

AMENDED NOTICE OF MOTION

Index No.: 11 CV 6205 CJS

**AMENDED NOTICE OF MOTION FOR ATTORNEYS FEES PURSUANT TO
FEDERAL RULES OF CIVIL PROCEDURE §11-C**

Defendant, DONALD R. KUNEGO, by and through his attorneys, Lippman O'Connor, Robert H. Flynn, Esq., of counsel, hereby moves this Court for an award of attorneys fees pursuant to Fed. R. Civ. P. 11(c), which Motion is to be heard at the U.S. Courthouse, 100 State Street, Rochester, New York 14614, at a time to be established by the Court for the reasons set forth in the Affirmation of Robert H. Flynn, Esq. submitted in support of the instant Motion.

Dated: Buffalo, New York
July 26, 2013

LIPPMAN O'CONNOR

By: /s/ Robert H. Flynn, Esq.
Robert H. Flynn, Esq.
Attorneys for Defendant
Donald R. Kunego,
300 Olympic Towers
300 Pearl Street
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TO:

Daniel J. Wik
Pro Se Plaintiff
c/o non-domestic
659 Averill Avenue
Rochester, NY 14607

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

<p>DANIEL J. WIK,</p> <p>Plaintiff,</p> <p>-vs-</p> <p>DONALD R. KUNEGO,</p> <p>in his personal and individual capacity,</p> <p>Defendant.</p>	<p>AFFIRMATION OF COUNSEL</p> <p>Index No.: 11 CV 6205 CJS</p>
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STATE OF NEW YORK)
) ss.:
COUNTY OF ERIE)

Robert H. Flynn, Esq., being duly sworn affirms as follows:

1. I am an attorney duly licensed to practice in the State of New York, including the Western District of New York, and am affiliated with the law firm of Lippman O'Connor, attorneys for defendant, Hon. Donald R. Kunego, in the above-entitled action. As such, I am fully familiar with the facts and circumstances of this matter as set forth herein.
2. This Affirmation is submitted in support of the amended motion filed on behalf of defendant, Hon. Donald R. Kunego, seeking recovery of attorneys fees pursuant to Fed. R. Civ. P. 11(c) on the ground that plaintiff's Motion to Reconsider/Clarify/Objection, docketed on November 7, 2012 (ECF No. 35) was frivolous and/or filed to harass the defendant and/or to needlessly increase the cost of litigation.
3. Your Affirmant filed a motion for summary judgment seeking a dismissal of plaintiff's Complaint based on the Doctrine of Absolute Judicial Immunity (ECF No. 25). This

Court granted defendant's motion for summary judgment and issued an Order to that effect on or about October 9, 2012 (ECF No. 32).

4. Thereafter, plaintiff filed his Motion to Reconsider/Clarify/Objection (ECF 35) on or about November 7, 2012.

5. Your Affiant opposed plaintiff's Motion for Reconsideration by serving and filing an Affirmation in Opposition (ECF No. 38). Within said Affirmation in Opposition, your Affiant alleged plaintiff's Motion for Reconsideration to be frivolous and designed to harass the defendant and unnecessarily increase litigation costs. Accordingly, your Affiant requested that sanctions be imposed against the plaintiff.

6. Upon receiving defendants opposition papers, plaintiff served and filed a Reply Affidavit (ECF No. 39) in further support of his Motion for Reconsideration. The Reply Affidavit included 64 paragraphs of argument and was 23 pages long (including exhibits).

7. Thereafter, on March 1, 2013 this Court issued its decision on plaintiff's Motion for Reconsideration wherein the motion was denied in its entirety (ECF No. 40). At the same time, this Court Ordered that plaintiff Show Cause why sanctions should not be imposed pursuant to Fed. R. Civ. P. 11. Plaintiff was cautioned that sanctions would be imposed if plaintiff failed to respond to the Court's Order to Show Cause on or before March 29, 2013.

8. As this Court pointed out in its July 15, 2013 Decision and Order (ECF No. 42), plaintiff failed to respond to the Court's order to show cause. Said Order further directed defense counsel to file a motion for reasonable attorney's fees by July 26, 2013.

9. Pursuant to the Court's July 15, 2013 Order, the defendant submits the instant application for attorney's fees.

10. Lippman O'Connor is an in-house staff legal office for Selective Insurance Company of America. This fact is disclosed on our firm letterhead. Selective Insurance Company of America does not require its staff attorneys to keep billable hours. However, on numerous occasions, Selective Insurance Company of America has obtained reimbursed for legal services incurred by its staff counsel offices.

11. In order to recover reimbursement of attorney's fees, Selective Insurance Company of America has internally calculated the hourly rate of their staff counsel attorneys to be \$132.00 per hour. This is a lower rate than most private firms engaged in insurance defense work.

12. Based on that hourly rate, I am hereby requesting that this Court award attorney's fees in the amount of \$818.00 (6.2 hours @ \$132.00/hour). These are very conservative figures insofar as I did not keep contemporaneous time records. This amount is arrived at as follows:

Receipt/Review of plaintiff's Motion for Reconsideration:	2.5 hours.
Draft Opposition to Motion for Reconsideration:	2.3 hours.
Receipt and Review of plaintiff's Reply Affidavit:	1.2 hours.
Receipt and Review of Decision and Order:	0.2 hours

13. Should this application meet the Court's Approval, I would respectfully request that the Court's Order direct plaintiff to remit payment via money order or certified draft to "Selective Insurance Company of America" and reference Claim Number: 21029505.

WHEREFORE, it is respectfully requested that this Court issue an Order pursuant to Fed. R. Civ. P. 11 directing plaintiff to reimburse defendant for attorneys fees as a sanction for frivolous and vexatious conduct, together with such other and further relief as the Court deems just and proper.

Dated: Buffalo, New York
July 26, 2013

/s/ Robert H. Flynn
Robert H. Flynn

CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2013 I electronically filed the foregoing Amended Notice of Motion and Affirmation of Robert H. Flynn, Esq. with the Clerk of the District Court using its CM/ECF system which would then electronically notify the following DM/ECF participants on this case and *via United States Mail*:

Plaintiff:

Daniel J. Wik
Pro Se Plaintiff
c/o non-domestic
659 Averill Avenue
Rochester, NY 14607

/s/ Robert H. Flynn
Robert H. Flynn